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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-1A7025

DATE: March 10, 1977

MATTER OF: Swage Tool Supply, Inc.

DIGEST:

1. Those issues raised by protester after the limit of 10 days established in section 20.2(b)(2) of GAO Bid Protest Procedures are dismissed; timely issues will be considered.
2. Allegation that although proposal could not be considered for award agency led protester into believing its proposal would be considered is without merit, since RFP, in addition to listing a sole approved source, contained Required Source Approval criteria. Agency is under no obligation to orally supplement notification.
3. Although the number of accessories required by the RFP cannot be reasonably determined remedial action for this procurement is not feasible as protester's equipment has not been approved and it is not possible to determine whether protester's price was based on offering greater number of accessories than required.
4. Questions relating to delivery of items under contract are matters of contract administration, not reviewable pursuant to GAO Bid Protest Procedures. 4 C.F.R., Part 20 (1976).
5. GAO recommends that in future agency exercise more care in drawing its requirements and use more precision when it determines it is not advantageous to qualify products under Required Source Approval clause.

Swage Air Tool Supply, Inc. (Swage) protests against award of a contract to Industrial Wire & Metal Framing Company (Industrial) under request for proposals (RFP) F42650-76-00060 issued by the Directorate of Procurement and Production, Ogden Air Logistics Center, Hill Air Force Base, Utah (Air Force).

The RFP, listing Industrial as the sole approved source, was issued on May 10, 1976, and sought a total of 20 broach pulling assemblies which were to consist of "Little Brute" hand held pullers

B-187025

along with other specified components including mandrels and extra jaws. On the June 10, 1976 opening date two proposals, one from Industrial and the other from Swage, were received. By letter dated June 21, 1976, Swage's proposal was rejected by the Air Force and on that same date a contract in the amount of \$72,500 was awarded to Industrial.

Swage argues that the award of the contract to Industrial should be rescinded on the ground that the RFP was improperly interpreted by the Air Force. Swage next argues that the Air Force led it to believe that Swage would be considered for award when in fact only Industrial could qualify. The protester asserts that Air Force personnel never advised it that in order to be considered for award it had to qualify under the Required Source Approval criteria contained in the solicitation and that had Swage been so advised it would not have submitted a proposal. The protester also notes that the Air Force never advised Swage that its product (tested earlier by the Air Force) was unacceptable. Additionally, the protester indicates that although it was never seriously considered for award the Air Force furnished it with all the information necessary to submit a proposal. In this regard Swage advances the argument that since it was never seriously considered for award it is entitled to damages for having gone through the process of submitting its proposal.

This controversy has its roots in the events leading up to the issuance of this RFP. In 1975, the Air Force tested broach pulling tools manufactured by Swage and another firm as a part of that agency's search for tools for servicing the F-4 aircraft which would be superior to those supplied by the aircraft's manufacturer. The Air Force determined that although the tool supplied by Swage was superior to the original equipment tools it did not represent a sufficient improvement to warrant its procurement. Although the Air Force indicates that it informed Swage of these test results by telephone it neglected to provide Swage with a written notice.

We are informed that in February and March of 1976 the Air Force tested Industrial's "Little Brute" model. This item was found not only to be superior to the original equipment tools but also superior to any tool tested. Accordingly, on April 19, 1976, the Air Force executed a Determination and Findings (D&F) which indicated that Industrial was the only source for the broach pulling tool which is necessary for the maintenance of the F-4 aircraft and issued the subject RFP.

Although Industrial was the only firm solicited, Swage received notice of the requirement through the Commerce Business Daily (CBD) and requested a copy of the RFP. After reviewing the RFP Swage submitted a protest letter to the Air Force dated May 17, 1976, requesting that the agency delay any award. In this letter Swage complained that it was not informed of the agency's requirement for broach pullers until it discovered the requirement in the CBD. Swage indicated that it could have a prototype available within 60 days. Swage also disputed a statement allegedly made by Air Force personnel that Industrial's "Little Brute" was a patented item which necessitated a sole-source procurement. In a subsequent letter dated May 4, 1976, Swage also protested to the Air Force that it was never officially notified that its equipment submitted for testing did not meet agency requirements.

On the June 20, 1976 closing date Swage submitted a proposal which was evaluated by the Air Force. By letter dated June 21, 1976, the agency denied Swage's protest and rejected its proposal. The proposal was rejected on the basis that Swage's price "was considerably higher than that submitted by the low offeror and you [Swage] are not within a competitive range for further negotiations." Further, the Air Force indicated that patent or proprietary considerations relating to Industrial's tool had no bearing on the procurement and that it had no knowledge that there existed a product comparable to Industrial's tool. The Air Force also apologized for not providing Swage with a written confirmation of the test results. However, the agency affirmed its opinion that Swage's tool did not meet its standards and stated that it was not requesting that any firm develop a product to meet its requirements.

Swage then protested this award to the Air Force by letter dated June 29, 1976 based on the argument that the RFP requires 114 mandrels for each assembly or a total of 2,280 mandrels and 21 extra jaws for each assembly or a total of 420 extra jaws while Industrial proposes to deliver only a total of 114 mandrels and 21 extra jaws.

By letter dated July 16, 1976 the Air Force denied this second protest by stating that although the format of the RFP could have been improved Swage's interpretation was incorrect and Industrial's proposal was in accordance with its requirements.

Swage then filed the instant protest with this Office. The initial basis of Swage's present protest is that it reasonably interpreted the RFP as specifying 114 mandrels and 21 jaws for each of the 20 assemblies required and that except for the poorly drafted RFP Swage's total price of \$130,000 would have been lower

B-187025

than the \$75,000 total offered by Industrial. In addition Swage contends that at the time the RFP was issued Industrial's tool had not been developed.

Swage's protest letter also contains a narrative of the history of this procurement from its viewpoint. In this connection Swage has attached 27 pieces of correspondence dating from 1974 to July 1976, and has requested "an answer to all the questions that are offered in the letters in this file." We are unclear as to the exact nature of "all the questions" which are contained in the large number of letters submitted by Swage. It is clear, however, that the issues raised in these letters are either untimely in that they are being raised before this Office after the limit established by our Bid Protest Procedures of 10 days after they were known or should have been known, 4 C.F.R. § 20.2(b)(2) (1976), or they are incorporated into Swage's formal protests to the Air Force and subsequent protest to this Office. Those issues which are timely are included in our statement of Swage's protest.

In its supplemental report submitted to this Office in connection with this protest the Air Force states that it rejected Swage's proposal because the agency determined under paragraph D-1(b)(1) of the Required Source Approval clause of the RFP that it was not practicable for the Government to incur the cost and time needed to institute qualifications for a new source which was not the low offeror. Consequently, the agency argues that it is immaterial how Swage interpreted the RFP requirements for mandrels and jaws as its offer could not be accepted.

Swage responds that if the Air Force's position concerning the disqualification of its proposal can be accepted then Swage was deceived by Air Force personnel into believing that its proposal could be accepted for award and demands that it be awarded damages. In this connection Swage contends that at no time during many conversations with Air Force personnel was it informed of the qualification requirements included in the RFP. In further support of its position Swage notes that the Air Force furnished it with all the materials needed to submit a proposal.

Swage's position that it was not aware that its proposal might not qualify for award is without merit. The RFP provides on the cover sheet: "Only Known Qualified Source - Industrial Wire & Metal Forming Inc.," and "Note: Only Those Sources For This Item Previously Approved By The Government Have Been Solicited. See Section D-1, 'Required Source Approval'." The Required Source Approval clause

included in the RFP again lists Industrial as the only source and sets forth the criteria which must be met by other offerors wishing to submit a proposal. It is hard to believe that one could read this RFP and not be on notice that Industrial was the only approved source and that the criteria set forth in the Required Source Approval clause must be met before a proposal would be considered. Further, in a letter dated May 19, 1976 to Swage regarding the protester's request for an RFP the Air Force stated "If you will review Section B-1 page 9, of the solicitation, the Government requires the product manufactured by the Industrial Wire and Metal Co. * * *." It is clear, therefore, that Swage was adequately informed through the RFP and the letter of May 19 of the necessity for qualification prior to consideration for award. The Air Force was under no obligation to orally supplement these notifications. Nor does the fact that Swage was provided a copy of the RFP in any way indicate that Swage was an approved source. See Armed Services Procurement Regulation (ASPR) § 1-1002.1 (1975 ed.).

The provision of the Required Source Approval clause under which Swage's proposal was rejected is as follows:

"b. Offers based on the submittal of approval information in accordance with paragraph (a) hereof MAY, as determined by the Contracting Officer, be considered for award under this solicitation ONLY IF:

(1) The evaluation of such offers is practicable and in the Government's interest considering the availability of resources and cost to the Government for the qualification of new sources for the required item(s) as well as the advantages anticipated to be derived by the Government as a result of such qualification;"

Although this provision does not state that offers will be considered for qualification only if they are the lowest offer received it appears that the Air Force could have determined under this provision that the advantages to be derived by qualifying an offer which, like Swage's was considerably higher (\$130,000 for Swage versus \$75,000 for Industrial) than that received from the qualified source would not justify the expense of qualification. Although the Air Force has been neither completely clear nor consistent in its statements describing the reasons for rejecting Swage's proposal we believe that the above-cited provision provides the agency with sufficient discretion to have rejected Swage's proposal because of its high price in relation to that offered by Industrial.

However, this conclusion is irreconcilable with the agency's position that the interpretation of the requirements of the RFP for mandrels and extra jaws is irrelevant to this protest as Swage was not qualified for award. Since Swage was determined not to be suitable for qualification because of its price and since Swage insists that its price was higher than Industrial's only because the Air Force interpreted the RFP to permit Industrial to submit fewer mandrels and jaws, the interpretation of the RFP is, indeed, relevant to this protest.

The RFP includes a schedule at pages 10 and 11. The schedule on page 10 provides that Item one is to consist of 20 broach pulling assemblies. Under this item are listed letters A through E which describe different components of the assembly. Under many of the letters are listed numbers beside which descriptive features of the components are set forth. It is clear that each of the letters and numbers on page 10 describe components which must be included in each of the 20 assemblies.

The controversy focuses on page 11 of the RFP which contains a continuation of the schedule which provides in pertinent part as follows:

"MANDRELS REQUIRED:

- A. 20 OF EACH FINAL SIZE 1/4", 5/16", 3/8".
 - B. 10 OF EACH FIRST OVERSIZE FOR ABOVE DIA. 17/64 21/64 25/64
 - C. 2 OF EACH SECOND OVERSIZE FOR ABOVE DIA. 9/32 11/32 13/32
 - D. 2 OF EACH OF ALL 9 SIZES WITH TIP CUT OFF FOR LIMITED ACCESS HOLES.
- (TOTAL 114 MANDRELS)

OPERATING, MAINTENANCE, AND OVERHAUL INSTRUCTIONS.

ILLUSTRATED PARTS BREAKDOWN.

EXTRA JAWS (TOTAL 21):

- A. 5 EA JAWS FOR EACH FIRST OVERSIZE DIA.
- B. 2 EA JAWS FOR EACH SECOND OVERSIZE DIA."

Since no new Item number is listed on page 11 and since the designations "(TOTAL 114 Mandrels)" and "(TOTAL 21)" are not only used on page 11 but also under B on page 10 "(3 TOTAL)" we do not

B-187025

believe it can be reasonably determined from the RFP whether page 11 requires a total of 114 mandrels and 21 extra jaws or 114 mandrels and 21 extra jaws for each of the 20 assemblies.

Although Swage argues that had it known of the Air Force's interpretation of the requirement for mandrels and extra jaws it could have offered a price lower than that offered by Industrial, it is not possible to determine from Swage's offer that it was, in fact, based on supplying 2,280 mandrels and 420 extra jaws. Moreover, even if the price were based on the extra quantity, it is not possible to determine what portion of the price could be attributed to the extra quantity. Since the equipment Swage has offered in response to this RFP has not been approved remedial action for this procurement is not feasible. In this connection the agency has offered to test Swage's equipment for future procurements.

Swage raises several questions concerning the delivery of items under Industrial's contract. Questions relating to the delivery of items under a contract are matters of contract administration and not procurement actions which are reviewable by our Office pursuant to our Bid Protest Procedures. 4 C.F.R., Part 20 (1976 ed.)

Although it is clear that the Air Force is not totally without fault in this situation we do not find that the agency's actions here approach the arbitrary and capricious standard necessary for our Office to consider a claim for bid preparations cost; the only type of "damages" considered by our Office. T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

We recommend that in the future the Air Force exercise greater care in drawing up its requirements for these items and that it be more precise in its rationale when it determines that it is not advantageous to qualify a product under its Required Source Approval clause.

R. F. Kissel
Acting Comptroller General
of the United States